DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: DATE: MAY 30 1975

MATTER OF: B-114868

Expenditures for the legal expenses of Indian tribes

DIGEST:

Snyder Act, 25 U.S.C. § 13, provides discretionary authority for Secretary of the Interior to pay for attorney's compensation and expenses incurred by Indian tribes from appropriations for purposes of improving and protecting resources under jurisdiction of Bureau of Indian Affairs, if Indians have insufficient funds to obtain such services.

This decision to the Secretary of the Interior is in response to a request of the Solicitor, Department of the Interior, by letter dated November 27, 1974 (together with enclosures), for our decision regarding authorization for expenditures to pay for attorney's fees incurred by Indian tribes.

The Solicitor cited the Secretary of the Interior's decision of June 4, 1974, regarding a Northern Cheyenne Tribe petition as one situation raising the question of authority to pay for tribal legal expenses. In that decision the Secretary granted part of a petition by the Tribe to withdraw departmental approval of leases and permits to stripmine coal on the Northern Cheyenne Reservation, denied part of the petition, referred some questions to an administrative hearing and held others in abeyance. The Secretary stated in the decision that he would support the tribe in a lawsuit against the coal companies or a request that the Justice Department under 25 U.S.C. § 17[illegible] (1970) bring a suit in the name of the Tribe to test the validity of the permits and leases. Because of "extraordinary circumstances," including the substantial sums of money expended in presenting the petition, the Secretary stated that:

> "* * * to the fullest extent permitted by my statutory authority, I will defray the expenses to be subsequently borne by the Tribe for attorney's fees and other costs in the administrative proceeding I have directed to take place and in any litigation it now wishes to commence against the companies."

There is mentioned in the enclosure with the Solicitor's letter the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 499 F.2d 1095 (D.C. Cir. 1974). The United States Court of Appeals for the District of Columbia reversed a district court decision (360 F. Supp. 669 (D.D.C. 1973)) awarding attorney's fees and expenses to an Indian

.27

tribe which had successfully challenged regulations promulgated by the Secretary of the Interior. The district court had ruled that in view of 25 U.S.C. §§ 175 and 476, the provisions in 28 U.S.C. § 2412 excluding the award of attorney's fees in cases arising out of suits against Government officials did not bar the tribe from making claim for attorney's fees arising from a suit which was founded on the contention that the Secretary had breached a trust owed to the tribe. The Court of Appeals citing United States v. Gila River Pima-Maricopa Indian Community, infra, held that the district court's discernment of the cited statutory authority to award attorney's fees was in error and in the absence of a statute expressly authorizing the award of legal fees and expenses against the United States, the district court was without authority to do so. The Solicitor attached to his letter correspondence from Members of the Senate Judiciary Committee urging the Secretary to settle the controversy in Pyramid Lake by using appropriated funds to satisfy the original award.

In light of these two situations, the Solicitor asks if the Secretary of the Interior is authorized to pay tribal legal expenses including attorney's fees from appropriated funds in cases where (1) the Government is not an adverse party, (2) where the Government is potentially in an adversary role and (3) where the Government may be brought into the matter as an essential party.

Legal representation may be provided to Indians by a United States attorney pursuant to 25 U.S.C. § 175 (1970), which provides that--

> "In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."

This duty has been construed as a discretionary one, and the Attorney General has been held to have properly refused to represent tribes in cases presenting a conflict of interest where the United States was a party and where it was not. Siniscal v. United States, 208 F.2d 406, 410 (9th Cir. 1953), cert. denied, 348 U.S. 818 (1954); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d 53, 56 (9th Cir. 1968); Rincon Band of Mission Indians v. Escondido Mutual Water Company, 459 F.2d 1082, 1085 (9th Cir. 1972); Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, 353 F. Supp. 1098, 1100 (D. Ariz. 1972).

In cases in which the Attorney General declines to provide representation, Indian tribes are authorized to employ counsel at their own expense, the choice of counsel and fixing of fees being subject to approval

of the Secretary of the Interior. 25 U.S.C. §§ 476, 81-82a. Funds for the compensation and expenses of attorneys so employed have been regularly appropriated by Congress (in the Department's annual appropriation acts) from tribal trust funds. See, e.g., Department of the Interior and Related Agencies Appropriation Act, 1975, Pub. L. No. 93-404, 88 Stat. 803, 811.

The basic statutory authority for expenditure of funds appropriated for the benefit of Indians is found in the Snyder Act, ch. 115, 42 Stat. 208 (1921), 25 U.S.C. § 13 (1970), which provides as follows:

> "The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
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> "General support and civilization, including education.
>
> "For relief of distress and conservation of health.
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> * * * * *
>
> "And for general and incidental expenses in connection with the administration of Indian affairs."

The Senate report accompanying H.R. 7848, 67th Congress (enacted as the Snyder Act), set forth the following explanation of the necessity for passage of the bill as contained in a letter from the Acting Secretary of the Interior (S. Rep. No. 294, 67th Cong., 1st Sess. (1921)):

> "While the Indian appropriation bill for the fiscal year 1922 was under consideration in the House of Representatives points of order were made and sustained on a number of items appearing in the bill because of the fact that there was no basic law authorizing such appropriations.
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> "Section 463 of the Revised Statutes provides that 'The Commissioner of Indian Affairs shall * * * have the management of all Indian affairs and all matters arising out of Indian relations.' This law was enacted July 9, 1832. As treaties were made with various tribes and reservations set aside for them, the Indian problem became more complicated, and numerous activities have been undertaken in order to more speedily bring about the civilization of the Indian tribes of the United States. There has been no specific law authorizing

> many of the expenditures for the benefit of the Indians. Congress, however, has continued to make appropriations to carry on the activities of the Indian Service.
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> "In view of the fact that there is no basic law at the present time authorizing many of the items appearing in the annual Indian appropriation act, and the further fact that the bill in question would give Congress authority to appropriate for the expenses of the Indian Service for all necessary activities, it is recommended that H.R. 7848 be enacted into law."

See also 61 Cong. Rec. 4659-4672 (1921). The Supreme Court in commenting on the above-quoted provisions of the Snyder Act has stated, "[t]his is broadly phrased material and obviously is intended to include all BIA activities." Morton v. Ruiz, 415 U.S. 199, 208 (1974).

While the legislative history of the Snyder Act contains few specific references to what Congress considered within the class of "all necessary activities" authorized, provisions for compensation and expenses of attorneys had been included in prior Indian Service appropriations. Although there apparently were appropriations for the payment of private attorneys in cases involving public lands (see Act of March 3, 1893, ch. 209, 27 Stat. 612, 631), generally the appropriations were for attorneys employed by the Department (i.e. Government attorneys) to protect Indian property in matters such as probate and land claims. See, e.g., the Act of March 3, 1921, ch. 119, 41 Stat. 1225, 1242, and the Act of July 1, 1898, ch. 545, 30 Stat. 571, 594 (substantially reenacted each year through the Act of February 17, 1933, ch. 98, 47 Stat. 820, 825). In 1934 legal services previously justified as line items in the budget of the Bureau of Indian Affairs operations (and as line items in Interior's annual appropriation act), were transferred to the Solicitor's Office under the Secretary and apparently provided for in a lump-sum in the appropriation for the Office of the Solicitor. See the Budget for fiscal year 1935, p. xxx of the President's message and pp. 256, 257, 266, and 267 of the Budget. Cf. p. 299 of the Budget for fiscal year 1934.

The Bureau of Indian Affairs has executed four contracts with Indian tribes providing for payment of the tribes legal expenses, including the fees of private attorneys, incurred by those tribes. (Contract Nos. K51C14200686, dated June 13, 1972; J50C14202332A, dated July 1, 1973; M00C 14201471, dated January 18, 1974; and A00C14202884, dated June 25, 1974.) Each of these contracts cites the Snyder Act as authority for the obligations. In a letter dated May 2, 1975, conveying copies of these

contracts to our Office, the Associate Solicitor for General Law, Department of the Interior, stated that each of the contracts was entered into after a finding that the Indian tribes were unable to pay for the required services.

Appropriations for the operation of Indian programs are normally available for among other things "expenses necessary to provide * * * management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs." This appropriation is enacted in the form of a lump-sum with no specific limitations as to use. Thus, the determination of what expenses are necessary for the stated purpose is left to the reasonable discretion of the Secretary.

Application to the courts has often been necessary for Indian communities to preserve their land, water and other resources. Because of the unique and pervasive relationship of the Federal Government to the Indians, the proper conduct of Government officials is frequently an issue in such litigation. The Secretary of the Interior could reasonably determine that providing legal expenses for an impecunious Indian tribe to pursue certain legal remedies is necessary for the improvement and protection of tribal resources, irrespective of whether the Government is or is not an adverse or essential party.

In light of the foregoing, and particularly the broad language and legislative history of the Snyder Act, as well as our obligation to liberally construe statutes passed for the benefit of Indians and Indian Communities (Ruiz v. Morton, 462 F. 2d 818, 821 (9th Cir. 1972), aff'd mem., Morton v. Ruiz, supra.), it is our view that the Secretary of the Interior has the discretion to expend available appropriations to pay tribal legal expenses including attorney's fees where he determines it necessary to do so, subject to the limitations set forth below. In cases where the opposing party is not the United States, 25 U.S.C. § 175 (providing for representation by United States attorneys) would bar the use of appropriated funds, except in cases in which the Attorney General refused assistance or in which his assistance was not otherwise available. In this regard, we note that one of the contracts executed by BIA to pay (with appropriated funds) for Indian legal expenses provided for a Special Counsel to act for the San Pasquale Band of Mission Indians in litigation and agency proceedings where the United States Attorney was already representing the Band (Contract No. J50C14202332A, dated July 1, 1973), and, hence, in our opinion was unauthorized. Similarly, we question the availability of appropriated funds to retain private attorneys to, in effect, review the Justice Department's preparation of the case involving the Northern Pueblo Tributary Water Rights Association. (Contract No. M00C 14201471, dated January 18, 1974.)

In light of congressional appropriations for attorneys fees from tribal trust funds, the practice of the Department in contracting to pay for such fees only where it was found that the Indians were unable to pay, and the obligation of the Secretary of the Interior to determine that it is necessary to pay such fees for the protection of Indian resources, it would seem appropriate that before such expenditures are made by the Secretary there be a finding that the Indians have insufficient funds to otherwise obtain those services. The Department's prior practice of obtaining specific authority for general legal assistance to Indians irrespective of their financial status (such as the appropriations to provide probate and land claim services cited above) is support for this position.

In view of the past practice of the Department, if the Secretary wishes to pay general legal expenses and attorneys fees for Indian tribes irrespective of their independent ability to pay, we recommend that he request Congress for specific authority and appropriations for such purpose.

The question presented is answered accordingly.

SIGNED ELMER B. STAATS

Comptroller General
of the United States